F. M. S. REPORTS

[APPELLATE CIVIL JURISDICTION]
HUGGARD, C.J., BURTON & MUDIE, JJ.
December 14, 1934.

V. KANAGASABAI ..... Plaintiff-Appellant.

v.

THE STATE OF SELANGOR..... Defendant-Respondent.

[SELANGOR CIVIL APPEAL No. 18 of 1934]

Unilateral Contract—Construction—Tender for cartage of materials on indent—Acceptance of Tender—No obligation to issue indents.

In April, 1931, the Public Works Department of the State of Selangor invited tenders for cartage and general transport. The plaintiff-appellant's tender was accepted and he entered into a contract, in the following form, with the defendant-respondent.

GOVERNMENT OF SELANGOR

CARTAGE CONTRACT

A CONTRACT made on the 12th day of June, One thousand nine hundred and thirty one BETWEEN V. Kanagasabai of Telok Datoh (hereinafter called the Contractor) of the one part and the State Engineer, Selangor, for and on behalf of the Government of Selangor (hereinafter called the Government) of the other part.

Whereas the Government are desirous of arranging for the supply of such number of bullocks, carts, drivers and coolies as may be required for the service of the Public Works Department in the district of Kuala Langat.

And Whereas the Contractor is prepared to supply such bullocks and carts, drivers and coolies upon the terms and subject to the conditions hereinafter appearing. Now it is hereby agreed as follows:—

1. This Agreement shall continue to be in force for a period of twelve months from the first day of July, 1931, to the thirtieth day of June, 1932.

2. Within 24 hours of receiving the written requisition of the Executive Engineer, the Contractor will supply such number of bullocks, carts, drivers and coolies not exceeding sixty (60) carts in accordance with Schedule A hereto as may be required in such place or places, as may be specified in the said requisition.

Provided that in case where large quantities of road metal, or other materials, are required to be removed from the Railway Yards or other places where rent or other charges are incurred for storage, the Contractor within 24 hours of the receipt of a requisition from the Executive Engineer stating such requirements, shall provide a number of bullocks carts, drivers and coolies not exceeding twenty five (25) carts and the said bullocks, carts, drivers and coolies shall work from 6 a.m. to 6 p.m. until such road metal or other materials be removed as required, failing which the Contractor shall be liable to pay such rent, demurrage or other charges as flow from his failure as aforesaid, in addition to any other sum payable for breach of this contract.

3. In consideration whereof the Government doth hereby agree, on or before tenth day of every month during the period of this contract, to pay to the Contractor such amount, calculated according to Schedule B, as shall have become due to the Contractor during the preceding month for services performed under this contract.

The amount of this contract is limited by the value of the indents issued, but under no circumstances shall the total exceed Dollars Twenty four thousand five hundred and thirty six ($24,536/–) only.

4. In the event of the Contractor failing at any time to supply any carts, bullocks, drivers or coolies or otherwise to perform any services in terms of this contract, he shall be liable to pay to the Government the cost of engaging other carts, bullocks, drivers or coolies and it shall be lawful for the Government to deduct any such sum or any sum, accruing due under clause 2 hereof, from any sum or sums due to the Contractor under this Contract or any sum deposited by him under clause 10 hereof.

5. The Government reserves to itself the right to transport for its own or any use the materials herein mentioned by any other means.

6. The Contractor shall, in respect of the subject matter of this contract, conform to all laws statutory rules, regulations and by-laws in force from time to time in the place where the work is being, or to be executed, and shall pay all fees that may be lawfully demanded by any public officer in respect of the work and, if he shall employ for the purposes of the work any persons being Indian labourers within the meaning of Part VI of the Labour Code, 1923 he shall perform all duties and pay all assessments prescribed by the said Part to be performed and paid by the employer of such labourers.

7. The Contractor shall not transfer or assign this contract or any part share or interest therein.

8. The Contractor shall be fully responsible for, and shall make good any damage that may occur to the materials transported by him, or which after requisition he has failed to transport. He shall take full responsibility for claims by third parties arising out of damage caused by either the Contractor's labour force, plant, or belongings, or any materials carted.

9. The Government will not be responsible for damage to the Contractor's labour force, plant or belongings, caused by accident due to the state of any road or track, or due to falls of earth or to the nature of the load carried.

10. And lastly, for the due and faithful performance of all and each of the agreements herein contained, the Contractor doth hereby by way of security deposit with the State Engineer, Selangor, the sum of dollars one hundred and fifty ($150/–) only and if the Contractor, his executors, or administrators shall, at the expiry of this contract, have performed and observed the stipulations provisions and conditions on his and their part to be performed and observed the Government shall repay to the Contractor the said sum of Dollars One hundred and fifty ($150/–) only or such sum as may be due after making all lawful deductions under Clause 4 hereof.

IN WITNESS WHEREOF the said parties have hereto set their hands this 12th day of June, 1931.

Signed by the said V. Kanagasabai in the presence of Sd. V. S. Chelliah. } Sd. V. Kanagasabai Contractor.

Signed by the said State Engineer, Selangor, in the presence of Sd. P. Sokalingam. } Sd. Stanley J. Gooch, State Engineer, Selangor.

SCHEDULE A.

SPECIFICATION FOR CARTAGE.

* * * * * *

SCHEDULE B.

RATES AND FARES FOR TRANSPORT

from 1st July, 1931, to 30th June, 1932.

* * * * *

During the first seven months of the year covered by this contract indents were issued by the Public Works Department to the plaintiff-appellant and executed by him to the value of $5,414.47, but during the remaining five months, all cartage work, for financial reasons, was carried out by the Public Works Department themselves, except for a small amount of work costing $123.83 for which other contractors were employed.

The plaintiff-appellant instituted a suit claiming a sum of $19,121.53, which represents the difference between the amount which he was paid in respect of the indents issued to him and the maximum amount of $24,536, mentioned in the contract or, alternatively, a claim to be paid for such cartage work as had been diverted from him and executed by the Public Works Department or others contractors.

Held, that there was no obligation on the defendant-respondent, either from the terms of the contract itself or from surrounding circumstances, to provide the plaintiff-appellant with work to the value of $24,536, or any work.

Held further, that by virtue of the provisions of clause 5 of the contract, the defendant-respondents were at liberty to do any part of the work themselves and/or through other contractors.

Decision of Thomas, C.J. affirmed.

M. Morrison for the plaintiff-appellant.

H. C. Willan, Deputy Legal Adviser, for the defendant-respondent.

Cur. Ad. Vult.

HUGGARD, C.J.—In this matter the facts are not in dispute and may be briefly stated.

In April, 1931, the Public Works Department of the State of Selangor invited tenders for certain services, the material portion of the Tender Notice being as follows:—

> "Tenders will be received at the office of the State Engineer, Selangor, up to noon of the 5th May, 1931, for the following services for P.W.D. Kuala Langat from 1st July, 1931, to 30th June, 1932:—
>
> 1. Supply of granite metal from Sungei Durian Quarry.
> 2. Supply of Quartzite metal from Sungei Rawang Quarry.
> 3. Supply of granite metal from Batang Benar Quarry.
> 4. Transport by Tongkang.
> 5. Cartage and General Transport.
>
> All particulars may be obtained at the office of Executive Engineer, Kuala Langat . . . . . "

The plaintiff in this action was one of the several contractors who submitted tenders for Cartage and General Transport under Item 5 of the above Tender Notice. It is clear from his form that he tendered for rates and that his tender was not based on quantities. In his evidence in the Court below he said—"When I tendered those rates I had no idea as to the quantities": but he went on to say that having done some P.W.D. work he knew what would be the volume of the work coming under a contract of this sort.

When all tenders had been received, the Public Works Department drew up a comparative statement of tenders showing, in the first column, the approximate quantity of materials to be transported during the year, and, in subsequent columns, the amount at which each tender worked out, based on the rates quoted by the respective tenderers. The plaintiff's tender worked out at $24,536. This was the lowest tender and was accepted. The plaintiff said in the Court below —and his evidence on this point is not contradicted—that he was shown this Comparative Statement and that he subsequently signed the Contract, Exhibit "A".

The material portions of this Contract are as follows:—

[Here the judgment sets out the recitals and clauses 1, 2, 3, 4, 5 and 10 of the contract.—Editor.]

During the first seven months of the year covered by this Contract indents were issued by the Public Works Department to the plaintiff, and cartage work was carried out by the plaintiff, to the value of $5,414-47; but during the remaining five months, all cartage work was, for financial reasons, carried out by the Public Works Department themselves except for a small amount of work costing $123.83 for which other contractors were employed. It is not denied that during the last five months of the year no indents were issued to the plaintiff.

In these circumstances the plaintiff instituted the present suit claiming a sum of $19,121.53, which represents the difference between the amount which he has been paid in respect of the indents issued to him and the maximum amount of $24,536 mentioned in the Contract. His contention was, and is, that under the terms of the Contract the Public Works Department were under an obligation to issue indents to him up to the maximum sum specified in the Contract, and that, until that sum had been reached, it was a breach of contract on the part of the Department either to perform any road transport work themselves or to employ any contractor, other than the plaintiff, to perform such work. In other words he contended that this was a definite contract for work to be done to the value of $24,536.

Alternatively the plaintiff claimed to be entitled to be paid for such cartage work as had been diverted from him, that is to say, the work

which admittedly had been carried out departmentally or through other contractors, and which, the plaintiff contended, should have been given to him.

It was, and is, agreed that in the event of the plaintiff succeeding on either of the above claims a deduction would have to be made for expenses which he would have incurred in carrying out the work.

In support of his contentions as set out above the plaintiff relied on the form of the Tender Notice, on the fact that his tender alone was accepted, and on the fact that before he signed the Contract he was shown the Comparative Statement of Tenders which contained the approximate quantity of materials to be transported during the year. He also relied on the terms of the Contract itself and particularly the recitals, and he pointed out that in order to be in a position to comply with the terms of Clause 2 of the Contract he had to maintain an extensive and expensive organisation. His evidence on this latter point was that his organisation consisted of three lorries, three lorry drivers, thirteen bullock carts, and thirty-nine pairs of bulls, and that the cost of maintaining this organisation was over $6,000 for the period of the Contract.

The defendants resisted both the above claims on the grounds that Exhibit "A" was a unilateral contract, that it merely represented a continuing offer by the plaintiff which the defendants might accept by issuing indents but which they were under no obligation to accept. They contended that under the terms of Exhibit "A" they were under no obligation to give the plaintiff any work at all and were at liberty to carry out the work themselves or to employ any other contractors to carry it out. In this connection they relied particularly on Clause 5 of the Contract.

In the Court below the learned Chief Justice found in favour of the defendants on all points, and from that decision the plaintiff has appealed to this Court.

It appears to me that the result of this appeal must depend on the answers to be given to the following questions:—

1. Was the Contract (Exhibit "A") a definite contract for work to be done up to a maximum amount of $24,536, and was the appellant entitled to call upon the Respondents to provide him with work up to that amount?
2. Alternatively, were the respondents bound under the Contract to indent on the appellant for all their requirements in connection with road transport work during the period covered by the Contract up to the limit of $24,536, or were they at liberty to do any part of the work themselves and /or through other contractors?

In my opinion the answers to the first of these questions is clearly in the negative. I can find nothing in the Contract itself or in the surrounding circumstances to support the contention that the respondent undertook to provide the appellant with work to the value of $24,536. Some reliance is placed by the appellant on tho recitals to the Contract where it is stated that:—

> "the Government are desirous of arranging for the supply of such number of bullocks, carts, drivers and coolies, as may be required for the service of the Public Works Department . . . . . "

and that—

> "the Contractor is prepared to supply such bullocks and carts, drivers and coolies . . . . . "

But in my view those recitals, when read in conjunction with the rest of the Contract, mean no more than that an arrangement has been arrived at between the parties for the supply by the appellant of bullocks, carts, drivers and coolies as and when required by the respondents. It is expressly stated in the latter part of Clause 3 of the Contract as follows:—

> "The amount of this contract is limited by the value of the indents issued, but under no circumstances shall the total exceed Dollars Twenty-four thousand five hundred and thirty-six ($24,536) only."

This clause appears to me definitely to dispose of the appellant's contention on this point, and I entirely agree with the conclusion arrived at by the learned Chief Justice in the Court below that the sum of $24,536 was inserted in the Contract merely as a maximum which was not to be exceeded.

The first question set out above having been answered in the negative it is necessary to consider the second question.

The contention of the appellant is that it must be implied as a term of the Contract that he was to carry out all the Public Works cartage requirements during the period of the Contract up to the limit of $24,536; in other words, that the Contract must be construed as giving the plaintiff a monopoly of the cartage work to be carried out during that period and up to the limit.

I think I may say that I should have no hesitation in accepting this contention were it not for the existence of Clause 5 of the contract which provides as follows:—

> "5. The Government reserve to itself the right to transport for its own or any use the materials herein mentioned by any other means."

The answer to the second question set out above depends, in my opinion, entirely on the construction to be placed on this Clause of the Contract, and particularly on the words "by any other means."

For the appellant it is argued that the effect of this clause may have been to entitle the respondents to have the materials in question transported by water instead of by road, but that it did not entitle them to carry out any road or railway transport themselves or to employ other contractors. The words "by any other means" are, however, very wide and I cannot see any sufficient reason for placing such a restricted construction on this Clause as is put forward by the appellant. It seems to me to be a reasonable assumption that if the parties had intended the words "by any other means" to mean "by water instead of road" they would have used words which would have unequivocally expressed that intention.

It was also suggested in the course of the argument that, even if Clause 5 entitled the respondents to do any part of the contract work themselves, it did not entitle them to employ contractors. other than the appellant, for that purpose. Here again I have failed to find any sufficient ground for drawing such a distinction. If the Clause entitled the respondents to do the work or any part of it departmentally (as I think it did) then I can see no reason for holding that they were precluded from employing other contractors.

In my opinion therefore Clause 5 of the Contract means exactly what it says, and consequently it is not possible to import into the Contract an implication which would be in direct conflict with that Clause.

Accordingly the answer to the second question set out above must also be in favour of the Respondents.

In the result I agree with the conclusions of the learned trial Judge that under the true construction of the Contract the respondents were under no obligation to the appellant to call upon him to carry out any cartage work and that by virtue of Clause 5 they were free to do the work themselves and to employ other contractors.

It may well be said that upon this construction this Contract was of a very one-sided character, but contracts have to be construed in accordance with the language used by the parties who made them; and implied terms cannot properly be imported into a contract unless it can be clearly shown that both parties must have intended such terms to be part of the agreement between them. In the present case the language used by the parties appear to me to be perfectly clear and I think that I am bound to give full effect to it.

In the course of the argument we were referred to a number of authorities. I have carefully examined all those authorities but have not considered it necessary to refer to them in this judgment. Every contract has to be construed according to its own terms, and the construction of one contract can afford little guidance in the construction of another unless the facts and surrounding circumstances are identical or practically identical.

It may be observed, however, that in *Hornsby* v. *The Vestry of the Parish of St. Luke's Chelsea*, 2 L.T.R. N.S. 176, which was the case mainly relied upon by the appellant, there was no provision in the contract which was under consideration in that case corresponding in any way to Clause 5 of the present Contract.

For these reasons I am of opinion that this appeal should be dismissed with costs.

BURTON, J.—On 12th June, 1931 the plaintiff was given a Cartage Contract for the Public Works Department for the District of Kuala Langat from the 1st July, 1931 to the 30th June, 1932. The plaintiff received requisitions under the contract up to about the end of 1931, but was not required by the defendant after that to do any more work under the contract.

During the latter half of 1931 the plaintiff was required to do work under the contract to the amount of $5,414.17, and the Public Works Department also used its own lorries. In the first half of 1932 the financial condition of the State of Selangor seriously restricted work; with the result that, although the Public Works Department transported less in its own lorries than in the latter half of 1931, the plaintiff was not required to do any work. He complains now that because he had to keep up an expensive organisation to meet sudden demands under the contract, there was an implied agreement that he should do all transport work in the district of Kuala Langat up to the amount of $24,536.00 in clause 3 of the contract.

A number of cases were cited to us, but those cases do little more than establish that this class of unilateral contract is common, and that in these cases the acceptance of the tender does not make a contract, but it is merely an intimation by one contracting party that it is willing to accept the offer of the other contracting party as and when it requires the articles or services to be supplied. The cases are difficult to reconcile, and it is not easy to draw any general principles from them applicable to this case, but that difficulty is inherent because of the differences of wording of the various contracts considered; and it seems to me that the present case must be resolved merely by a consideration of the wording.

Mr. Morrison's first argument referred to the recitals. He then proceeds to argue that the Government was debarred under the contract from doing any of the work itself or giving it to other contractors unless in the year the contractor got work to the value of $24,536.00. This argument depends on the interpretation of clause 5:—

> "The Government reserves to itself the right to transport for its own or any use the materials herein mentioned by any other means."

Mr. Morrison argued that as two contracts were let at the same time, one for land transport and one for water transport, in this clause in the land transport contract "other means" means water transport, and in the water transport contract land transport. But I cannot give it such a restricted meaning. I think it is clear that the words import "other means" than that provided in the contract, and that includes not only the use of its own lorries but the employment of other contractors. It was suggested that there was at any rate an implied provision that no other contractor should be employed; that at any rate if any work was not performed by the respondent's lorries and was given out to contractors, it was at any rate an implied condition that such work would not be given to any other contractor.

On general principles I think that a contractor tendering in the cirumstances of this case, might reasonably expect that at any rate he would get all the work given to contractors. The actual Tender Notice is not very helpful on this point, nor is the tender itself. But the mere fact of issuing Tender Notices and accepting tenders might be thought to give some sort of a guarantee to the successful tenderer that he will be given what work there is. He no doubt has to maintain some organisation so that he may be ready to obey requisitions in the terms of the contract, and unless there is some such implied term, the State may at any time ignore the contract and his organisation, and give the work to any person it may light upon who consents to do it cheaper. And if it is the case that there is no implied term the rates of the successful tenderer being known it is obvious that in times of falling prices the office of the Engineer would be besieged by men willing to work for a less rate, while in times of rising prices the contractor would have to suffer any loss accruing from the rates he tendered.

In *Hornsby* v. *The Vestry of St. Luke's Chelsea*, 2 L.T.R. N.S. 176, a term was implied that the vestry should employ Hornsby and no others to perform the contract. But that contract is different from ours because it contained the express power, if the work was not properly done, to set the contract aside on three days' notice. But I do not think we can imply such a term in the contract in this suit. It is no doubt reasonable to make this implication, but it is not clear to my mind that the parties have intended that there should be this stipulation; as Lord Esher, M.R. said in *Hamlyn & Co.* v. *Wood and Co.*, (1891) 2 Q.B. 488, at page 491:—

> "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the Contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

I think therefore, the appeal should be dismissed with costs.

MUDIE, J.—This is an appeal from the judgment of the learned Chief Justice dismissing the plaintiff's claim against the defendant for damages for breach of contract.

On the 12th June, 1931, the plaintiff, who is a cartage contractor, entered into a contract with the defendant, the State of Selangor, for the supply of such number of bullocks, carts, drivers and coolies, as might be required for the service of the Public Works Department in the district of Kuala Langat during the period from the 1st of July, 1931, to the 30th of June, 1932.

As the plaintiff's claim depends on the construction of the contract, it is necessary to set it out at length. It reads as follows:

[Here the judgment sets out the contract in full.—Editor]

The plaintiff's services were requisitioned and work under the contract was done up to the 31st of December, 1931.

The plaintiff's grievance is that after that date the defendant did all the work with his own lorries, except for a small amount of cartage to the value of $123.83, which was given to two other contractors jointly. He says that under the contract he was entitled to do all the work the defendant required up to the agreed maximum during the period of the contract, and that by doing the work himself and employing other contractors, the defendant committed a breach of the contract. He claims the difference between what he has been paid under the contract and the profit he would have made on supplying the defendant's requirements for the year.

The plaintiff's case does not rest on any express provision in the contract. His contention is that if the agreement is read as a whole, there is a clear implication that the defendant will call upon him for all the transport he requires up to a limit of $24,536.00. He contends that as he

has to maintain at great expense an organisation for the supply of the defendant's requirements, there is necessarily implied an obligation on the part of the defendant not to do the work himself or to employ another contractor. He cites a passage in the judgment of Cockburn, C.J. in *Churchyard* v. *The Queen*, L.R. 1 Q.B. 173 at page 195:

> "So, if a man engages to work, and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work. So, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration. Numerous other cases might be put of the same kind; but in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent, and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. This I take to be a sound and safe rule of construction with regard to implied covenants and agreements which are not expressed in the contract."

He also relies on *Hornsby* v. *The Vestry of the Parish of St. Luke, Chelsea*, 2 L.T.R. N.S. 176, a case similar in its main features to the present one, where it was held that the contract contained an implied covenant on the part of the defendants to employ the plaintiffs and no others for the performance of the works therein referred to during the specified time.

The case for the defendant is that the contract is nothing more than a continuing offer on the part of the plaintiff, and that the only way the offer can be accepted is by the issue of indents. He says there is no obligation to issue any indents at all, and that there is nothing in the agreement to prevent him from doing the work himself or employing other contractors. Clause 5 of the contract expressly enables him to do so.

He relies on the following authorities:—

Burton v. *The Great Northern Railway Company*, 156 E.R. 216; *The Great Northern Railway Company* v. *Witham*, L.R. 9 C.P. 16; *Moon* v. *Camberwell Corporation*, 89 L.T. 595; *The Queen* v. *Demers*, 1900 A.C. 103; *Percival, Lim*, v. *London County Council*, 87 L.J.K.B. 677; *Secretary of State* v. *Madho Ram*, (1929) I.L.R. 10 Lah. 493.

It was held in these cases that in a contract of this nature there is no obligation to give an order.

On the authority of these cases I think it is clear from the terms of the contract that there was no obligation on the defendant to issue indents to the plaintiff, and that he was entitled to do the work himself.

But it is not so clear that he was entitled to employ other contractors. Each contract must be interpreted according to its own terms. See the judgment of Atkin, J., in *Percival, Lim*, v. *London County Council*, (*supra*) at page 678:—

> "These tenders have been the subject of litigation before now, and they vary in form, but one knows that it is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all; in other words, the contractor offers to supply goods at a price, and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound. There is also an intermediate contract that can be made in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course. if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do need some of the articles the subject of the tender, and do not take them from the tenderer."

This contract is very similar to the contract in *Hornsby* v. *The Vestry of the Parish of St. Luke, Chelsea*, (*supra*) where it was held that there was an implied agreement on the part of the defendants to employ the plaintiff and no one else.

In considering whether a similar covenant should be implied in this contract, the warning

of Cockburn, C.J., in *Churchyard* v. *The Queen*, (*supra*) contained in the passage from his judgment quoted above, must not be overlooked:—

> "But in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties."

The difficulty of applying the *Hornsby* case to this contract arises from clause 5 which provides:—

> "The Government reserves to itself the right to transport for its own or any use the materials herein mentioned by any other means."

The plaintiff contends that "other means" should be construed as "means other than road transport," e.g. water transport.

In my view such a construction is untenable. The clause is general. I cannot see any ground for limiting its application.

I am further of opinion that the generality of the clause excludes the application of the *Hornsby* case. The words "any other means" extend to the carts of other contractors. To hold otherwise would be to restrict the generality of the language. In my opinion, therefore, a covenant not to employ other contractors cannot be implied without doing violence to the language of clause 5.

It is well established that a term cannot be implied in a contract contrary to its express provisions. In *Cutter* v. *Powell*, 101 E.R. 573; 3 R.R. 185, Lord Kenyon, Ch. J., said:—

> "That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law."

For these reasons I am unable to accept the plaintiff's contention that a covenant should be implied on behalf of the defendant that he will not do the work himself or employ other contractors.

My view of this contract is that there was no obligation on the part of the defendant to give orders to the plaintiff, that he was at liberty to do the work himself, and that, in view of clause 5, he was entitled to employ other contractors.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
November 16, 1934.

LEE ENG HOCK, HO KOK LEONG, KHOO HOOI HAW
(On behalf of themselves and other shareholders) .....Plaintiffs.
v.
MALAY-SIAMESE PROSPECTING COMPANY, LIMITED .....Defendants.

[PERAK CIVIL SUIT No. 368 of 1934]

Company—Rejection of proxies—Instrument of Proxy—Attestation by appointee's substitute—Representative action by shareholders.

At the annual general meeting of the defendant company, the first and second plaintiffs were present and voted against a resolution, which was carried. The third plaintiff was not present, but was represented by a proxy, whose vote against the resolution was wrongly rejected. Had this vote been accepted the resolution would still have been passed.

Certain other proxies were rejected on the ground that the appointee's substitute had attested the signature of the appointor. At the meeting the appointee was present and consequently his substitute's provisional appointment never materialized.

Held, that the wrongful rejection of the third plaintiff's proxy gave rise to a grievance common to all the shareholders who had voted against the resolution entitling the plaintiffs to sue in a representative capacity on behalf of such shareholders.

Held further, that the proxies attested by the appointee's substitute were invalid and rightly rejected.

C. D. D. Hogan for the plaintiffs.

J. H. B. Will for the defendant company.

Cur. Ad. Vult.

HOWES, J.—In this case there are two Motions before the Court; one by the defendant company containing two prayers:—

(1) That the claims of the plaintiffs Nos. 1 and 2 be dismissed and that the plaint in so far as it seeks to make such claims be struck out on the ground that it discloses no cause of action at the instance of the plaintiffs Nos. 1 and 2.

(2) That the words "on behalf of themselves and all others the shareholders of the defendant company who voted against or were opposed to the resolutions passed at a general meeting of the defendant company held on the 31st July, 1934," also be struck out of the plaint on the ground that the plaint discloses no matters giving ground for an action against the defendant company at the instance of the plaintiffs Nos. 1, 2 and 3 or any of them as representing all others the shareholders of the defendant company, who voted against or were opposed to the resolutions passed at a general meeting of the defendant